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MEMORANDUM

TO: Service List in D.T.E. 97-116 Docket

FROM: Paula Foley, Hearing Officer

RE: Procedural Schedule on Remand

DATE: October 24, 2002

On August 27, 2002, the United States District Court for the District of Massachusetts ("District Court") remanded to the Department of Telecommunications and Energy ("Department") three of its orders dealing with the issue of reciprocal compensation for the termination of ISP-bound traffic.¹ In its decision, the District Court granted the motions for summary judgment of WorldCom and Global NAPs to the extent that they sought a declaration under 47 U.S.C. § 252(e)(6) that the Department's D.T.E. 97-116-C (1999), D.T.E. 97-116-E (2000), and D.T.E. 97-116-F (2001) Orders did not comply with federal law, and that the Department's D.T.E. 97-116 (1998) Order did comply with federal law. The District Court remanded the cases to the Department for further proceedings consistent with those parts of the Magistrate Judge's recommended decision that explicated the reasons for granting summary judgment to WorldCom and Global NAPs (namely, that the Department had not conducted a detailed analysis under Massachusetts law and other legal or equitable principles whether provisions within the parties' interconnection agreements provided for reciprocal compensation for the exchange of ISP-bound traffic).

¹ Global NAPs v. Verizon, Nos. 00-10407-RCL, 00-11513-RCL (D. Mass. August 27, 2002).

On October 15, 2002, the Department filed a notice of appeal of the District Court's decision with the United States Court of Appeals for the First Circuit and will shortly file a motion for stay of the District Court's decision. Unless and until the District Court's remand is stayed, the Department is under a continuing obligation to comply with the requirement to engage in "proceedings or deliberations" that "consider the contractual language in the parties' interconnection agreements" in accordance with the District Court's August 27, 2002 decision. Therefore, it is appropriate for the Department to proceed with the remand while the appeal is pending. In the event a stay is entered in this matter, the proceedings at the Department will also be stayed.

When a reviewing Court does not give an agency explicit directions for the conduct of a remand proceeding, the agency retains the discretion to make its decision on the basis of the existing record. See, e.g., Point of Pines Beach Assoc. v. Energy Facilities Siting Bd., 419 Mass. 281, 287 (1995); Attorney Gen. v. Energy Facilities Siting Bd., 419 Mass. 1003, 1005 (1995); Holyoke St. Ry. Co. v. Department of Pub. Utils., 347 Mass. 440, 450 (1964); Adams v. Contributory Retirement Appeal Bd., 33 Mass. App. Ct. 171, 175 (1992), *rev'd on other grounds*, 414 Mass. 360, 364, n.4 (1993); Lion Distribs., Inc. v. Alcoholic Beverages Control Comm'n, 15 Mass. App. Ct. 988, 990 (1983); Atkinson's, Inc. v. Alcoholic Beverages Control Comm'n, 15 Mass. App. Ct. 325, 326-327 (1983); Charlesbank Restaurant, Inc. v. Alcoholic Beverages Control Comm'n, 12 Mass. App. Ct. 879, 880 (1981); Sniffin v. Prudential Ins. Co. of America, 11 Mass. App. Ct. 714, 722 (1981).

Accordingly, the Department hereby determines that the District Court's remand instructions may be appropriately addressed through legal argument presented in briefs by the parties and we establish the following briefing schedule. **Briefs will be due November 8, 2002; reply briefs are due November 15, 2002.** All briefs will be subject to a 30-page limit. Please file 10 copies of all briefs with the Secretary of the Department and submit an electronic version to dte.efiling@state.ma.us referencing docket D.T.E. 97-116-G. In addition, briefs should be distributed to the attached service list.

Please contact me at (617) 305-3608 with any questions.